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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1936

ANTONIO MARENO, Jr., a minor 16 years of age, by his mother and next friend, Kathlene C. Mareno,

Petitioner,

vs.

JAMES M. WALKER, individually and as Principal of Lakeland Senior High School, Shrub Oak, New York, and ROBERT F. WILLIS, individually and as a Substitute Homeroom Teacher in Lakeland Senior High School, Shrub Oak, New York,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

Statement 1

The Case For Adickes 2

The Case For The Student 5

Conclusion 9

Table of Cases

Adickes v. Kress & Co., 398 U.S. 144(1970) 2

Appeal of Coates, 47 Wash.2d 51, 287 P.2d 102(1955) 4

Bott v. Bd. of Ed.,Deposit Cent. Sch. Dist., 41 N.Y.2d 265, 360 N.E.2d 952(1977) 8

Goss v. Lopez, 419 U.S. 565(1975) . . 8

International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229(1976) 2

James v. Board of Education of Central Dist. No.1, Etc., 461 F.2d 566(2nd Cir.,1972), cert. den., 409 U.S. 1042(1972) 6

Rodriquez v. Bd. of Ed.,Eastchester Union Free Sch. Dist., et al, 616 F.2d 2701(2nd Cir.,1980) 2

Russo v. Central Sch. Dist. No.1, Towns of Rush, Etc.,N.Y., 469 F.2d 623(2nd Cir.,1972), cert. den., 411 U.S. 923(1973) 7

Page

Thonen v. Jenkins, 517 F.2d 3 (4th Cir.,1975) 5
Tinker v. Des Moines Independent Community School District, 393 U.S. 503(1969) 7
Wood v. Strickland, 420 U.S. 308(1975) 7,8

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STATEMENT

Petitioner recognizes in respondents' brief some of the same arguments they advanced in their opposing brief before the

Second Circuit panel, all of which have been answered seriatim in the reply brief (at pages 2 through 8) filed below by petitioner. Consequently, petitioner will not burden this court with a repetition of petitioner's rejoinder there, since these arguments are not addressed to the questions presented in the petition.

THE CASE FOR ADICKES [1]

Respondents' condemnation of Question No. 1 in the petition is made in poor grace. Granted that petitioner's counsel only discovered Adickes and its progeny subsequent to the filing of the briefs before the Second Circuit panel, it requires only a reading of Point I of petitioner's main brief there(pages 3 and 4) to ascertain that petitioner placed maximum importance upon the district court's factual findings in the case. This was enough to invoke Adickes. Cf. International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U. S. 229 at 235, footnote 7(1976). Indeed, in Rodriquez [2] (about which respondents make no comment) the panel did not require even that much of a signal from Rodriquez before invoking the Adickes principle sua sponte.

1/ Adickes v. Kress & Co., 398 U.S. 144 (1970)

2/ Rodriquez v. Bd. of Ed., Eastchester Union Free Sch. Dist., et al, 616 F.2d 2701(2nd Cir.,1980)

Moreover, petitioner's counsel was not admitted to practice at the Second Circuit bar, and, therefore, had to obtain leave of court to argue the appeal pro hac vice. It would hardly have been worth the effort for counsel merely to devote a 10 minute argument time exclusively to matters already covered in the briefs.

Most, if not all, of the panel's questions were directed to petitioner's counsel, while respondents' counsel, for the most part, had merely to sit back, intone his prophesy of doom(his chief weapon all along), and unleash an "undifferentiated fear" of what First Amendment sanction for petitioner's reactionary verbal thought would portend for the public schools. Consequently, respondents could not have known of the frustration experienced by petitioner's counsel in not being able to gain the panel's ear where it counted most.

While, undoubtedly, any appellate court has the prerogative and the duty to interrupt arguing counsel in order to get at the heart of the matter, seldom, if ever, has that prerogative been employed in a manner which has the effect, at least, of leading counsel away from the heart of the matter, which, in this case, was the district court's evidentiary findings. What the case came down to was the legality of the district court's fashioning of the strongest factual predicate, to say the least, for application of the Chaplin-

sky perspective, as against that court's obligation to fashion the weakest factual predicate for that purpose.

In fact, one of the judges[believed to be Brieant, J.] observed, "Two wrongs don't make a right." 3/, thus clearly acknowledging the culpability of respondent Willis in the affair. This observation, added to that of another judge[Meskill, J.] to the effect that there are times when one just has to be silent, plainly announce that a majority of the panel was exacting from a 16 year old schoolboy the wisdom of a Solomon under circumstances not required even of a junior high school principal facing a similar stress. See, Appeal of Coates, 47 Wash.2d 51, 287 P.2d 102(1955).

It is deeply regretted, and certainly

3/ This observation marks the first time anyone connected with the case either on an administrative or a judicial level acknowledged any wrongdoing on the part of respondent Willis except such as may be implicit in Dean Sarkissian's referral of the matter back to respondent Walker. It is significant because, while most well meaning parents will accept objective disciplining of their children by school administrators and teachers, few will tolerate the deliberate pushing around of their children by maladjusted school officials once they recognize it as such.

injurious to petitioner's reputation as a human being whose budding life remains largely in front of him, that these judges did not disassociate themselves from the factual findings of the district court. For where is the virtue in begrudging petitioner his rightful place in history as the victim of aggression in order to perpetuate the myth that there are no bad teachers -- only bad students, when, for reasons announced infra, all of Lakeland now know otherwise?

At the very least the abortive disposition of the case in medias res has deprived petitioner of the opportunity to ascertain through discovery on the damages issue if Dean Sarkissian ever informed respondent Walker of his disenchantment with respondent Willis' behavior toward students which he candidly imparted to petitioner and his father. Cf. Thonen v. Jenkins, 517 F.2d 3, 6(4th Cir.,1975).

THE CASE FOR THE STUDENT

Today, Lakeland High School is without a principal, facing the upcoming 1980-81 term which will be petitioner's senior year. After 13 years as principal of the 1350 student high school respondent Walker suddenly resigned the position to take a job as principal of a 550 student high school in North Salem[another school district in the county]. And, according to an article appearing in The Evening Star on May 1,

1980, on page 3[a daily newspaper published in Peekskill, New York, and circulating in the Lakeland School District area], respondent Walker gave as his reason for resigning his post at Lakeland, "I find the smaller size more manageable, and it will be a good change for me."

In the aftermath of Walker's resignation school board member Martin Promisel is reported on page 15 of the June 5, 1980 issue of the same newspaper to have done some finger pointing at problem schools in the district which included Lakeland High School, while noting that the principalship in Lakeland High School[there are two high schools in the district] is "the toughest in the district." In discussing problem schools which had turned around, Promisel said, "I hope with the right leadership Lakeland High School can do the same." One of the problems he pointed to at Lakeland High was "staff not properly supervised."

Petitioner finds these news articles to be a fitting post script to his argument before the Second Circuit panel that the issue in the case is more a case of teacher unfitness, and less a case of student misbehavior -- calling attention to the Second Circuit's caveat in James 4/ [restated in

4/ James v. Board of Education of Central Dist. No. 1, Etc., 461 F.2d 566(2nd Cir.,1972), cert. den., 409 U. S. 1042 (1972)

Russo 5/] that the courts " . . . cannot tolerate undisciplined, coercive, intimidating or disruptive activities on the part of teachers . . . which threaten the essential functions of our schools . . .." However, in handling petitioner's case, Respondent Walker, unaccustomed to his statutory responsibilities for student discipline by reason of any personal involvement, was suddenly thrust into the vortex of the dispute by Dean Sarkissian in view of the teacher's complicity, was ill equipped to deal with it, panicked, and, as a result, gave short shrift to both petitioner and his parents.

It's as though Walker never heard of Wood v. Strickland, 420 U. S. 308(1975), and of the administrative responsibilities it imposed upon him as the recipient of a portion of the school board's disciplinary authority -- responsibilities which were honored more in the breach than in the observance insofar as concerns safeguarding petitioner's rights. In fact, for any school district lawyer to contend at this late date, in the aftermath of Tinker 6/, that restraints on student speech(or, as in this case, verbal thought, in view of petitioner's lack of intent to communicate)

5/ Russo v. Central Sch. Dist. No. 1, Towns of Rush, Etc.,N.Y., 469 F.2d 623(2nd Cir.,1972), cert. den., 411 U.S. 923(1973)

6/ Tinker v. Des Moines Independent Community School District, 393 U.S. 503(1969)

in the school environment do not directly and sharply implicate First Amendment values, and, in the aftermath of Goss 7/, that a one day suspension of a student from school is a trivial punishment, is certainly not likely to have counseled the principal at all with respect to administrative and disciplinary responsibilities laid down in Wood v. Strickland, supra.

With Walker gone the future augurs well for students at Lakeland High School, as it is highly unlikely that respondent Willis will find a safe haven in Walker's successor[whether stemming from inexperience or a camaraderie of sorts] to support his free wheeling sorties among the students now that it is crystal clear that the school board, with whom petitioner never had any quarrel, is as much concerned with teacher fitness in Lakeland High School as it is in student discipline there. Cf. Bott v. Bd. of Ed.,Deposit Cent. Sch. Dist., 41 N.Y.2d 265, 360 N.E.2d 952(1977).

However, for the present, and from the standpoint of this case, since a corrective disposition should have been achieved below under the guidance of James, but was not, the Second Circuit's caveat in James must be viewed as being mere sabre rattling insofar as it may be viewed as offering students any protection against disruptive teachers. For a stronger case for the application of the James caveat is not likely to be found than that presented by petitioner's case.

7/ Goss v. Lopez, 419 U.S. 565(1975)

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted

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July, 1980